Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

TERRY BELK; DWAYNE COLLINS, ON BEHALF OF THEMSELVES AND THE CLASS THEY REPRESENT,

Petitioners,

v.

WILLIAM CAPACCHIONE, ET AL.,
AND
THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
DENNIS D. PARKER
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 965-2200

*JAMES E. FERGUSON, II
JULIUS L. CHAMBERS
JOHN W. GRESHAM
S. LUKE LARGESS
FERGUSON STEIN CHAMBERS WALLAS ADKINS GRESHAM & SUMTER, P.A.
741 Kenilworth Avenue, Ste. 300
Charlotte, NC 28204
(704) 375-8461
**Counsel of Record*

Attorneys for Petitioners

4291P

QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below err when they determined that the Charlotte school system had attained "unitary status" despite the uncontested facts that:

(a) after operating largely integrated facilities for more than a decade, the district in 1992 altered its student assignment mechanism causing a dramatic increase in the number of racially identifiable schools;

(b) the demographic changes in the school system (on which the district court relied to explain and excuse this resegregation) did not begin until the 1990's, the same time that the school system changed its method of assignment;

(c) the school board built 25 of 27 new schools after 1979 in predominantly white suburban areas, in violation of its own policy and the court's express orders on siting schools, with the result of exacerbating the disproportionate burden of transportation on black students that the district court had identified in 1979 as a remaining vestige of prior *de jure* segregation; and

(d) at the same time, the school board allowed the condition of predominantly African-American, inner-city school facilities to deteriorate rapidly?

2. Did the courts below err in applying an "intentional discrimination" standard when determinating whether persisting racial disparities (for example in the condition of predominantly white and predominantly black schools) were vestiges of the dual system whose continuation was antithetical to the achievement of "unitary status"?

3. Did the courts below misconstrue and misapply this Court's decisions in *Board of Educ. v. Dowell*, 498 U.S.

237 (1991) and *Freeman v. Pitts*, 503 U.S. 467 (1992) in determining that the Charlotte school system had attained "unitary status" notwithstanding its consistent failure to comply with the district courts' remedial orders, with the result that vestiges of the *de jure* segregation to which those orders were addressed have not yet been eliminated?

4. Did the courts below err in refusing to consider a remedial plan adopted by the school district after this case was reactivated to finally address its continuing constitutional responsibilities — a plan which demonstrated the practicability of further desegregating its schools and eliminating racial disparities in their operation — on the grounds (stated by the district court) that the plan was only "hypothetical" and objectionable because it proposed race-conscious assignments and (stated by the court of appeals) that a unitary status inquiry does not require consideration of remedial alternatives that remain available?

LIST OF PARTIES

1. Karen Bentley, Respondent;

2. Terry Belk, Petitioner;

3. William Capacchione, Respondent;

4. The Charlotte-Mecklenburg Board of Education, Respondent;

5. Dwayne Collins, Petitioner;

6. Richard P. Easterling, Respondent;

7. Lawrence Gauvreau, Respondent;

8. Michael P. Grant, Respondent;

9. Arthur Griffin, Chairman of the Charlotte-Mecklenburg School Board, Respondent;

10. Eric Smith, Superintendent, in his official capacity, Respondent;

11. Charles Thompson, Respondent;

12. Scott C. Willard, Respondent;

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PETITION FOR CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Belk, et al v. Charlotte Mecklenburg Board of Education*, 269 F.3d 305.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a-221a, is reported at 269 F.3d 305. The order of the Court of Appeals on Rehearing, 382a-390a, is reported at 274 F.3d 814.The opinion of the District Court, 222a-367a, is reported at 57 F. Supp. 2d 228. The order of the District Court of April 14, 1999, 368a-376a, is unreported.

JURISDICTION

The Court of Appeals entered its judgment on September 21, 2001, 377a-381a. On December 10, 2001, the Chief Justice extended the time within which this Petition may be filed to and including January 21, 2002, which falls on a legal holiday. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no state shall "deny to any person within its jurisdiction the equal protection of the laws"

STATEMENT OF THE FACTS

Terry Belk and Dwayne Collins petition for certiorari from the September 21, 2001 decision of the *en banc* Fourth Circuit Court of Appeals, *Belk v. Charlotte Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001) (1a-221a)[1], affirming 7-4, the ruling of the district court below that the Charlotte-Mecklenburg Board of Education ("CMS" or "the Board") had attained unitary status in all respects. *Capacchione v. Charlotte Mecklenburg Board of Education*, 57 F. Supp. 2d 228 (W.D.N.C. 1999) (222a-367a).

Initial Proceedings in the Litigation

Belk and Collins are substituted representatives for those black families who originally filed this case in 1965 - an initially unsuccessful challenge to a "freedom of choice" pupil assignment plan that maintained racially segregated schools. See 229a (citing to *Swann v. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D.N.C. 1965)). The district court upheld the plan in 1965, finding that the Board did not have an affirmative duty to desegregate. *Id.* The Fourth Circuit affirmed. *Swann*, 369 F.2d 29 (4th Cir. 1966)

The plaintiffs moved for further relief in 1968 after this Court, in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), imposed on segregated school systems an affirmative duty to desegregate. 229a. The trial court found in April 1969 that approximately 14,000 black students remained in segregated schools, 264a, and concluded that the freedom of choice plan "had left the dual school system virtually intact." 23a, citing *Swann*, 300 F. Supp. at 1372. The court ordered CMS to submit a plan to

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[1] Citations in the form "_____a" are to the Appendix to this Petition, *infra*.

begin desegregation of the schools by the fall of 1969 and suggested some methods for achieving that goal. 231a.

The "school board was slow to act on the court's recommendations" and was criticized by the court for "foot-dragging." 231a, citing *Swann*, 300 F. Supp. 1381, 1382 (W.D.N.C. 1969). The district court approved an interim plan in August 1969 but "expressed reservations that a disproportionate burden of desegregation was being placed on black children." 231a (citing *Swann*, 306 F. Supp. 1291, 1298-99 (W.D.N.C. 1969)).

In November 1969, the court reviewed the effectiveness of the plan and found it had "not been carried out as advertised." 231a, quoting *Swann*, 306 F. Supp. 1299, 1302 (W.D.N.C. 1969). The plan did not have definable goals and did not safeguard against resegregation. *Id.* The district court concluded that the Board had shown "no intention to comply" with its constitutional duties, *id.*, quoting *Swann*, 306 F. Supp. at 1306, and designated a consultant, Dr. Finger, to draw up a plan. *Id.*

In February 1970 the Court adopted Dr. Finger's proposed plan for elementary schools and, with that consultant's modifications, a Board plan for secondary schools. 232a, citing *Swann*, 311 F. Supp. 265, 268-70 (W.D.N.C. 1970). The plan transported students among schools and paired grades from black and white elementary schools to accomplish desegregation. 233a n.6. The Board appealed, and the Fourth Circuit affirmed in part but remanded the elementary school aspect of the plan. *Belk*, 12a.

This Court granted certiorari and reinstated the trial court's orders pending further proceedings. *Capacchione*, 233a, citing *Swann*, 399 U.S. 926 (1970). After additional hearings, the trial court concluded that Dr. Finger's plan was

reasonable. *Id.*, citing *Swann*, 318 F. Supp. 786, 788 (W.D.N.C. 1970). This Court affirmed the orders, holding that district courts could invoke their equitable powers to fashion remedies to eliminate public school segregation. 234a – 235a (citing *Swann*, 402 U.S. 1 (1971)).

Within 60 days of this Court's ruling, CMS moved in the district court to abandon the Finger plan and permit the substitution of a new "feeder" plan. *Belk*, 14a (citing *Swann*, 328 F. Supp. 1346 (W.D.N.C. 1971)). Concerned about resegregation and the placement of additional burdens on African-American children, the district court openly questioned the proposed feeder plan. *Id.*, citing *Swann*, 328 F. Supp at 1350-53. The Board withdrew the plan and later submitted a revised one that the court adopted. *Id.*, citing *Swann*, 334 F. Supp. 623 (W.D.N.C. 1971)). In accepting the revised plan, the court "continued to express its dissatisfaction with the regressive and unstable nature and results" of the Board's plans and actions. *Capacchione*, 235a, citing *Swann*, 328 F. Supp. 1346 and 334 F. Supp. 623.

The district court declined to hear any additional matters until 1973, "in the hope that the board and its staff would undertake constructive remedial action." *Id.*, citing *Swann*, 362 F. Supp. 1223, 1230 (W.D.N.C. 1973). It did not happen.

> [W]ithin just two years it became clear that CMS's revised feeder plan was inadequate "for dealing with foreseeable problems" in the dismantling of the dual system. The district court found "that various formerly black schools and other schools will turn black under the feeder plan" and that "racial discrimination through official action has not ended in this school system." The district court again instructed CMS to design a new pupil assignment plan "on the premise that equal protection of the laws

is here to stay."

Belk, 14a, quoting *Swann*, 362 F. Supp. at 1229, 1230, 1238 (W.D.N.C. 1973). The district court detailed the "signs of continuing discrimination," including the busing burden placed on blacks, the pressures for resegregation created both by the feeder plan and by the operation of overcrowded white schools with mobile classrooms while historically black schools had empty seats, and the "substantial immunity from busing afforded to students in white areas in the east and southeast of the county." 362 F. Supp. at 1232-34.

In 1974 the Board adopted, and the court approved, a new series of policies and guidelines for pupil assignment that had originally been devised by a citizens' group. *Capacchione*, 235a – 236a; 15a, citing *Swann*, 379 F. Supp. 1102 (W.D.N.C. 1974). The district court called these new policies a "clean break" from past practices and attitudes. "If implemented according to their stated principles," the policies would result in a unitary school system. *Capacchione*, 236a, quoting *Swann*, 379 F. Supp. at 1103. The principles incorporated in the plan included avoiding majority black schools (with one elementary school experiment excepted), more equally distributing the busing burden, and guidelines for transfers to prevent "adverse trends in racial make-up of schools." *Id.* (citing to 379 F. Supp. 1104). See, also *Belk*, 15a (citing to 379 F. Supp. at 1105-1110). The principles also committed CMS to plan school sites in order to simplify rather than to complicate desegregation. *Swann*, 379 F. Supp. at 1104 (Guideline XI).

The district court's 1974 order approved the creation of "optional" schools with countywide enrollment. *Capacchione*, 236a. The court approved these schools, presently referred to as "magnet" schools, on the express condition that they not become freedom of choice havens for segregation or cause resegregation in any regular school. *Id.*

In 1975, noting that "continuing problems remain, as hangovers from previous active discrimination," the court expressed a confidence that the Board would address those problems, and placed the case on inactive status. *Capacchione*, 236a, quoting *Swann*, 67 F.R.D. 648, 649 (W.D.N.C 1975)).

Litigation Resumes; Problems Persist

A few years later, the court found that many forms of discrimination persisted. In 1978 a group of white parents sued to end the use of race in assigning students and to block a proposed reassignment. 240a (citing *Martin v. Charlotte Mecklenburg Bd. of Educ.* 475 F. Supp. 1318 (W.D.N.C. 1979)). The *Martin* plaintiffs alleged that CMS was now "unitary", and thus any consideration of race in assigning students was unconstitutional. *Martin*, 475 F. Supp. at 1322, 240a. Representative black families intervened in *Martin*, and alleged that CMS was not yet unitary, pointing to non-compliance with four aspects of the *Swann* orders – school siting, placement of early elementary grades in black areas, monitoring of student transfers to avoid resegregation, and placing burdens unduly on black children. *Martin*, 475 F. Supp. at 1328-29. In 1979 the same court that had decided *Swann* heard the evidence in *Martin*, and "re-examined and considered hundreds of pages of findings of facts and orders" from *Swann*, and concluded that "jurisdiction was still needed due to lingering effects from past active discrimination." 241a.

The court detailed at length the problems that remained in the four areas. First it held that the "CONSTRUCTION, LOCATION AND CLOSING OF SCHOOL BUILDINGS CONTINUE TO PROMOTE SEGREGATION." *Martin* 475 F. Supp. at 1329 (caps in original). The court reviewed several post-1974 siting decisions by CMS. It noted that, contrary to its orders, CMS

had, after 1974, built new schools in white neighborhoods and then bused black students into those schools to desegregate them. It found these siting decisions violated the principles approved by the court for the placement of schools. *Id.* at 1331-1332.

It held next that the "PLACEMENT OF KINDERGARTEN AND ELEMENTARY SCHOOL GRADES REMAINS DISCRIMINATORY AND UNFAIR TO THE SMALLEST BLACK CHILDREN." *Id.* at 1332. The court reviewed the fact that (with one exception) grades K-3 in school pairings were located exclusively in schools in white residential areas, leaving the busing burden entirely on the youngest black children. *Id.* at 1332-1334.

The court next held that CMS's "FAILURE TO MONITOR THE THOUSANDS OF PUPIL TRANSFERS . . . TENDS TO PROMOTE SEGREGATION IN THE SCHOOLS." *Id.* at 1335. The court found that CMS was not effectively monitoring the transfers of students among schools, which allowed transfers that cumulatively tended to to make certain schools become racially identifiable. *Id.* at 1335-1338

Finally, the court found that the "DISCRIMINATORY BURDENS OF DESEGREGATION REMAIN UPON THE BLACK CHILDREN." *Id.* at 1338. The Court explained various ways in which CMS continued to place the burdens of desegregation on black students, who were bused on longer routes and for more years than white students. *Id.* at 1338-1340. "In short, black children and their families continue to bear discriminatory burdens of desegregation." *Id.* at 1340.

The court concluded that each of these four problem areas was "interrelated with and not separable from . . . the pupil assignment portion of the desegregation effort." *Id.* at

1332, 1334, 1337 and 1340. As a result, "'[r]acially neutral attendance patterns' have never been achieved." *Id.* Despite these findings, the court restated its belief that CMS was committed to addressing the issues and concluded CMS needed more time. "I vote to uphold their efforts to date, and to give them that time." *Id* at 1347.

By 1980 black enrollment in the school system had reached 40%. *Capacchione*, 241a. The Board and the *Swann* plaintiffs moved jointly to modify the court orders to allow any elementary school to have a black enrollment up to 15% above the system-wide ratio of black students. *Id.* Notwithstanding the failures to fully implement the prior orders described in detail in many of the *Swann* orders and in *Martin*, CMS was able to keep most of its schools within *Swann's* racial balance guidelines in the 1970's and 1980's. 264a – 265a.

Major Student Assignment Changes Produce More Racially Identifiable Schools

In 1992, with black enrollment still at 40%, CMS undertook a major modification of pupil assignment – a plan it called "A New Generation of Excellence", 242a.[2] The new

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[2] The population of Charlotte had increased substantially from 1970 to 1997, but the percentage of blacks living in the county remained stable during this growth, increasing slightly from 24% in 1970 to 27% in 1997. 237a. This period of overall growth with relative racial stability was marked by the dispersion of blacks into suburban areas. 238a. As a result "there is a greater degree of residential integration in the county than there was thirty years ago," and "Charlotte has become one of the most racially integrated cities in America." *Id.* 238a.

At the time of the 1969 desegregation decrees, CMS enrolled about 84,000 students, 239a. In the 1998-1999 school year, CMS had 98,542 pupils, *id.*, an increase of about 14,500 students over 30 years. While racial enrollments were unstable in the years immediately following the desegregation orders, increasing from 29% black in 1969 to 40% in 1980, 241a, the percentage of black enrollment then stabilized.

assignment plan greatly expanded the use of the voluntary optional or magnet schools and phased out the "unpopular" mandatory pairing of schools from black and white areas. 242a. The plan also contemplated the increased use of "stand alone" schools in integrated areas and schools in "mid-point" areas with the stated goal of phasing out satellite zones. 242a – 243a. CMS took this major initiative without seeking court approval. 243a.

The trend toward resegregation of CMS's schools accelerated markedly following the decision to phase out pairings. *Belk*, 152a (Motz and King, dissenting). From 1992 to 1998, the number of blacks in identifiably black schools increased 50% system-wide, *id.*, and nearly 200% at the high school level, *Stevens report*, p. 21 (Fourth Circuit Jt.App. 9589). By 1998, some 30% of CMS's African-American students were attending racially identifiable schools.[3] *Belk*, 152a (Motz & King, dissenting). Twenty-three schools were identifiably black at the time of trial. *Id.* Twenty of those schools had been outside the court guidelines for at least three consecutive years after 1992. *Capacchione*, 57 F. Supp.2d at 248. Prior to the magnet expansion and the end of pairing, CMS had been able to maintain racial balance for periods of nineteen to twenty-six years in nearly all of these schools. *Belk*, 28a (Motz & King, dissenting).

In the 1998-99 school year, black enrollment was 42%. 239a. Following a period of overall decline until 1990, student enrollment then began growing by about 3,000 students per year. *Id.* Such growth was not unprecedented, however: at the time of the original 1969 decrees, CMS had been growing at a rate of 2,500 to 3,000 students per year. *Swann*, 300 F. Supp. at 1358, 1364 (W.D.N.C. 1969).

[3] Translated from percentages to numbers, over 12,000 black students were in segregated schools in 1998-99, compared to 14,000 at the time of the 1969 finding that CMS still operated segregated schools.

While deviations from target enrollment percentages at schools in the 1970s had involved variances of "one or two percent," 265a, and only a "few" schools were consistently out of balance in the 1980's. *Id.* Both the number of out-of-compliance schools and the extent of racial identifiability increased substantially after 1992.

No CMS school had been as high as 60% black until 1988. 263a. "Only seven schools have ever had black populations in excess of 75%, and this did not occur until 1994." *Id.* The black population at six of those schools jumped fifteen to twenty-five percentage points after adoption of the new pupil assignment plan. Other schools showed similar increases in racial identifiability after 1992. The number of black students enrolled increased more than 20% at West Charlotte High School (from 46% to 68%), Ranson Middle School (45% to 65%), Wilson Middle School (45% to 71%), Coulwood Middle School (35% to 55%), Merry Oaks Elementary (41% to 64%), Pawtuckett Elementary (37% to 59%) and Greenway Park Elementary (39% to 60%). CMS Ex. 47 (4th Cir. Jt. App. 13095 – 13099). Other schools' imbalances increased in only slightly less dramatic fashion, including Hawthorne Middle School (36% to 53%), West Mecklenburg High School (38% to 54%) and Garinger High School (49% to 61%), and the following elementary schools, Oaklawn (45% to 63%), Huntingtowne Farms (47% to 62%), Allenbrook (50% to 65%), Druid Hills (51% to 63%), Sedgefield (52% to 62%), Shamrock Gardens (51% to 61%) and Statesville Road (48% to 60%), *Id.*

The extent of identifiability increased at the predominantly white schools as well. Prior to 1992-93, no school had been 90% white; after 1992, there were eight schools with 90% or more white enrollment. *Id.* More generally, the schools with low black enrollments in 1999

that had been in operation since the 1970s had been racially balanced for most of the period prior to the changes in pupil assignment in 1992. *Belk*, 28a n.4 (Motz & King, dissenting).

The *Capacchione* court identified a problem inherent in numerous voluntary transfers under the magnet scheme. "[I]f enough students left their assignment zones for magnets, it would affect the balance of the schools to which they were otherwise assigned." 266a. Compare *id.* n. 23 (referring to overall impact of magnet schools' operation but not analyzing the Board's failure to have "rigid controls in place"). The resegregative impact of transfers of non-black students away from indentifiably black schools to magnet schools was significant. Data for 1998-99 from CMS Ex. 55 (4th Cir. Jt. App. 13165-13193) shows that at the middle school level, 44.3% of the assigned non-black students transferred away to magnets from four middle schools that were at least 60% black, compared to a rate of 18.4% of non-blacks transferring to magnets from all other middle schools. At the high school level 31% of non-blacks assigned to the four high schools that were 50% or more black transferred away to magnets, compared to 8.5% of non-blacks from the remaining high schools.

The 1992 assignment plan also included the proposal to increase the number of schools located "mid-point" between racially distinct areas. *Capacchione*, 242a – 243a & n.10. This proposal fit within the 1974 order, which held that "[b]uildings are to be built where they can readily serve both races." 270a, quoting *Swann*, 379 F. Supp. at 1107. The *Martin* court had found that CMS had yet to comply with this aspect of the pupil assignment orders as of 1979, *Martin*, 475 F. Supp. 1329-32. The *Martin* court specifically criticized CMS for building schools in white residential areas and then busing black students to them from distant areas.

CMS has built twenty-seven new schools since *Martin*, see Capacchione, 271a. Twenty-five of them in were located in predominantly white residential areas. *Belk*, 156a (Motz & King, dissenting). The "mid-point" approach was applied in locating, "at most, four of the twenty-seven new schools." *Id.* The purpose of the mid-point policy was to reduce the use of satellite zones. *Capacchione*, 242a – 243a. Because the mid-point policy was never applied, "CMS has had to create dozens of tiny satellite zones in the inner city" to assign black students to schools in white neighborhoods. 247a. Thus, as student enrollment increased, CMS coped with the situation by adding more satellite zones for black students, assigning them to newly built schools in white neighborhoods.

While the original court order in 1969 created nine satellite zones, by 1998 there were sixty-nine. See, 280a, citing CMS Exs. 262 – 264 (4th Cir. Jt. App. 15411 – 13). The 1992 plan abolished the use of nearly all of the "unpopular" satellite zones in white areas; instead one-way satellites from black neighborhoods became the predominant tool for desegregating schools. Sixty-three of the sixty-nine satellites, or 91 percent, were located in black neighborhoods. CMS Exs. 262 – 264. Of the 16,409 students assigned to schools by satellite, 14,957 lived in predominantly black neighborhoods. *Foster Report, Table 7. CMS Trial Exhibits 262-64.* Thus, while some of the new schools "have been able to accommodate racially balanced student populations," *Capacchione,* 57 F.Supp. at 252, this result could be achieved only by busing black children into distant white neighborhoods.

In addition, disparities in facilities and resources remain a serious problem. As CMS built new schools in white areas, it allowed many of the older facilities, attended predominantly by black students, "to fall into a state of

disrepair," *Belk*, 156a (Motz & King, dissenting). The only facilities expert to testify at the trial, Dr. Gardner, provided numerical assessments of CMS schools showing "substantial" racial disparities in the condition of facilities. *Id.* at 166a – 168a. Numerous witnesses confirmed his assessment of the problem. *Id.* at 168a – 169a. *Capacchione*, 296a – 297a. Even the three Board members, who had voted before the trial that CMS should seek unitary status, each testified that the Board needed to address disparities in facilities and resources in black schools. *Id.* *Belk*, 169a (Motz & King, dissenting).

The Present Phase of the Case

In September 1997, William Capacchione, a white parent, filed suit challenging the use of race in magnet school admissions. *Capacchione*, 243a. In October 1997 the *Swann* plaintiffs moved to reactivate *Swann*, alleging that CMS was not in compliance with the court's orders, and moved to consolidate the two proceedings. 244a. In March 1998 the District Court denied a Board motion to dismiss the *Capacchione* suit, granted the request to reactivate *Swann*, and consolidated the two cases, finding that the issue of unitary status was the common question between them. *Id.* In May 1998, a separate group of white parents called the Grant plaintiffs were allowed to intervene in the consolidated action, claiming that the system was unitary and the use of race in assigning students was unconstitutional. *Id.*

That same year, CMS undertook a "comprehensive analysis" of its record of compliance, whether vestiges of segregation existed and whether practicable remedial measures could be taken. *Belk*, 146a – 147a (Motz & King, dissenting). The Board then publicly adopted "The Charlotte Mecklenburg Schools' Remedial Plan to Address the Remaining Vestiges of Segregation." *Id.* The Remedial

Plan "detailed specific steps that the Board proposed to undertake" to attain unitary status. *Id.*

The Board produced the plan as an exhibit for trial, but the court granted a motion *in limine* to exclude it, finding that the Court was required to review only "what CMS had done, not what it may do in the future." Order of April 14, 1999 (373a). Thus, the court refused to allow into evidence any information on what practicable steps the Board could take to remedy the increasing racial imbalances, to address school siting and facilities issues, to relieve the unequal transportation burdens and to address racial disparities in the various *Green* factors and student achievement.

The court entered an order on September 9, 1999, finding that CMS had attained unitary status in all respects and that the magnet program's application process was unconstitutional. The court enjoined CMS from any consideration of race in the future. The Fourth Circuit stayed the injunction in an unpublished order. The *en banc* court vacated a panel decision that had reversed the finding of unitary status as to student assignment, transportation, facilities and resources and student achievement. *Belk v. Charlotte Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir. 2000) (vacated). The *en banc* court then voted 7-4 to affirm the unitary status determination, 6-5 to reverse the finding that the school board acted unconstitutionally in adopting the magnet plan while under court order, voted unanimously to reverse as to the injunction, and voted 6-5 to reverse the order awarding attorneys' fees to Grant and Capacchione. 5a. The court then denied reconsideration of the attorney's fees' issue. *Belk*, 274 F.3d 814 (4th Cir. 2001).

REASONS FOR GRANTING THE WRIT

I

The Court Below Ignored Basic Principles of School Desegregation Jurisprudence Established by this Court When It Affirmed the Unitary Status Holding Despite the School Board's Resegregative Changes in Student Assignments and Its School Location and School Repair and Maintenance Practices

This case presents fundamental legal questions under this Court's jurisprudence as to the conditions under which previously *de jure* segregated school systems can attain "unitary status" and be released from court supervision.

The court below ruled that CMS had attained unitary status even though the district had changed its student assignment policies without court approval, and then failed to monitor the segregative effect of transfers under its new assignment plan, both of which caused significant increases in the number of racial identifiable schools and the extent of segregation at those schools. From 1980 to 1997, the school board had also built 25 of 27 new schools in white residential areas while allowing existing schools in black areas to deteriorate. The changes in pupil assignment, in conjunction with the siting practices, fostered resegregation and intensified the burdens placed upon black students in the desegregation process.

These actions by CMS perpetuated or created classic vestiges of segregation recognized by this Court's precedent. Nonetheless, the majority of the court of appeals found that CMS had complied with the outstanding desegregation orders and had eliminated the vestiges of segregation to the extent practicable. This departure from settled principles established by this Court, in a widely publicized case that directly impacts the hundreds of school systems remaining

under court order, compels review of the judgment below.

Changes in Pupil Assignment While Under Court Order.

In 1992 CMS substantially modified its pupil assignment policies without court approval. The system's previous student assignment plan had maintained desegregation in "all but a few" of CMS's schools until the 1992 revisions, notwithstanding population growth in the county. The new student assignment plan rapidly phased out the "unpopular," court-approved system of mandatory pupil assignment to racially paired elementary schools that "fed" into assigned middle and high schools, replacing it with a major expansion of magnet schools. The board then failed to monitor the resegregative effects of student transfers to this increased number of magnet schools. Under the new plan, the number of schools outside of racial enrollment guidelines, and the levels of segregation at those schools, increased dramatically, due both to the "de-pairing" of previously paired schools and the impact of transfers.

CMS's action modifying its student assignment scheme while under a court desegregation order, in a manner that increased the number of identifiably black schools and the number of black students attending segregated schools, distinguishes this case fundamentally from the two major unitary status cases previously decided by this Court, *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991) and *Freeman v. Pitts*, 503 U.S. 467 (1992). In neither of those cases did the school board, knowing it remained under court supervision, substantially modify its pupil assignment plan in a manner that resegregated its schools.

Dowell. In *Dowell*, the school board had implemented a court-ordered desegregation plan in 1972. 498 U.S. at 241. In 1977 the trial court declared the school system "unitary" and ended active supervision of the case.

Id. Believing it was no longer under a desegregation order, the Oklahoma City Board of Education adopted a student reassignment plan ("SRP") that significantly increased the number of racially identifiable schools. *Id.*, at 242. The plaintiffs challenged the SRP as violating the court injunction, which they asserted had never been lifted. This Court concluded that because the 1977 order did not explicitly vacate the earlier injunctive decrees, they remained in effect. *Id.* at 244-45. However, the Court also found that the school board had acted with a good faith belief that it was no longer under court order when it adopted the SRP. *Id.* at 249 n.1. Under those unique circumstances, the Court remanded the case for a determination of whether the school board had been entitled to a unitary status declaration in 1985 when it adopted the SRP, without considering the decision to adopt the SRP or its effects on racial segregation in the system. *Id.* at 249-50.

Because *Dowell* was decided in 1991, the year *before* CMS modified its student assignment policies, CMS and its staff fully understood that the district remained under the court's desegregation orders when it shifted to the expanded magnet plan. (In fact, the magnet plan consultant advised CMS to obtain court approval of the changes.) Thus, CMS' decision to remake pupil assignment is wholly different from the circumstances surrounding adoption of the SRP in *Dowell.*

Freeman. The case is similarly distinct from *Freeman.* First, this Court found that the DeKalb County schools had implemented a court-approved desegregation plan in 1969 that established race-neutral student assignments and desegregated the schools before the process was overwhelmed by dramatic changes in the racial demographics of the county. 503 U.S. at 478-79. This Court considered the attendance patterns established in DeKalb to

be "race-neutral" just as in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). In Charlotte, however, the trial court had ruled in 1979 that "racially neutral attendance patterns have never been achieved," in specific and detailed distinction from *Spangler*. *Martin*, 475 F. Supp. at 1322-24, 1340.

Second, the DeKalb County school system had not changed its method of student assignment with segregative results. Prior to its application for unitary status, the only significant change in pupil assignment methods in *Freeman* came in 1976, when the court ordered the DeKalb system to expand its Majority-to-Minority ("M to M") transfer program, and when the DeKalb board introduced a small number of magnet schools. 503 U.S. at 473, 479.[4]

In CMS, the method of pupil assignment changed fundamentally in 1992, with significant "resegregative effect." Those effects - sharp increases in the number of racially identifiable schools and the extent of segregation at those schools, caused by school board action - persisted at the time of the district court's hearing as vestiges of a segregated school system.

Demographic Change

The court below distorted this Court's ruling in *Freeman* by applying it to CMS to hold that population growth within Mecklenburg County over thirty years, rather than the school board's actions in 1992, explained the sharp increases in segregation within the system from 1992 to 1999.

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[4] The trial court examined about 170 adjustments to attendance zones made within the framework of the court- ordered plan and found "only three had a partial resegregative effect." *Id.*

However, comparisons between the changes in racial demography in DeKalb and Mecklenburg counties show no commonality. Black pupil enrollment in DeKalb shot up from less than 6% in 1969 to 47% in 1986. 503 U.S. at 475. In the ten years before the DeKalb school system applied for unitary status, its overall elementary enrollment fell 15%, but black elementary enrollment still increased 86%; overall high school enrollment dropped 16%, while black high school enrollment increased 119%. *Id.* at 476. These dramatic changes resulted from an influx of tens of thousands of black residents into the southern part of the county and a commensurate exodus of whites that reshaped the county into racially distinct poles. *Id.* at 475.

In contrast, the black population in Mecklenburg County changed only from 24% in 1970 to 27% in 1997. 237a. Black student enrollment in CMS remained at a constant 40% for the decade preceding CMS's revisions to student assignment in 1992. 239a. These stable racial demographics coincided with increasing residential integration in the community from 1970 to 1997. 238a. Thus, CMS had maintained desegregation in all "but a few" of its schools when it decided to revamp its student assignment scheme. 265a.

The misapplication of *Freeman's* acceptance of a demographic explanation for resegregation to the markedly different circumstances in CMS requires review and correction by this Court.

Location Of New Schools

The courts below also misapplied this court's precedent in assessing the legal consequence of CMS's school siting decisions. This Court recognized in *Swann* itself, involving this very school district, that building new school facilities in predominantly white areas distant from

residential concentrations of minority students would "lock in" patterns of segregation that typified the dual system. 402 U.S. at 20-21. In *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 460 (1979), the Court reiterated that formerly segregated districts have an affirmative responsibility to ensure that school construction practices "do not serve to perpetuate or re-establish the dual school system." The duty applies to "the selection of sites for new school construction that had the foreseeable and anticipated effect of maintaining the racial separation of the schools." *Id.* at 462. The "failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Id.* at 459 (citing *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413-14 (1977) and other cases). In affirming the trial court's "unitary status" holding, the Fourth Circuit ignored these fundamental principles.

Despite marginally higher rates of growth in the school-age population in black residential areas from 1980 to the time of trial, CMS located 25 of 27 new schools in white residential areas, accelerating resegregation when CMS changed its pupil assignment methods in 1992 and putting the burden of desegregating those new schools almost entirely upon black children. Instead of locating schools in areas midway between racially distinct areas, CMS built schools in predominantly white areas and transported black pupils there to achieve some degree of desegregation in those new schools. This directly ignored the district court's directives in *Swann*, which required CMS to locate schools in places readily accessible to both races and to lessen the burdens placed on black families by desegregation. See *Martin*, 475 F. Supp. at 1329-1332; 1338-1340.

This case accordingly presents important questions about the continuing vitality of the principles established in *Swann* and *Penick* that this Court should resolve.

Deterioration Of Schools In Predominantly African-American Areas

The impact of building new schools in white residential areas upon the racial identifiability of the district's schools was compounded by the Board's failure to adequately maintain and provide resources in the schools located in the black residential areas. Racial disparities in the facilities of a formerly dual school system have long been recognized as a vestige of the segregated system. *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 435 (1968). The courts below, contrary to this Court's precedent, found that these disparities in facilities (and in resources) were not vestiges of desegregation because they had not been shown to be the result of intentional discrimination by the board. 40a. See Argument II *infra*.

II

Contrary to Decisions of this Court, the Majority Below Held That Racial Disparities in Various Areas of the School District's Operations Were Not Vestiges of the Dual System Absent a Showing That They Resulted from Intentional Discrimination

In *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979), this Court stated clearly that "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." (citing *Wright v. Council of City of Emporia*, 407 U.S. 451, 460, 462 (1972) and other cases).

Nevertheless, in assessing whether racial disparities in school siting, burdens of transportation, and the quality of facilities located in white or black residential areas that existed at the time of trial were vestiges of the prior dual

system, the majority below incorrectly applied an intentional discrimination standard. *E.g.*, 33a ("CMS never sited schools in order to foster segregation."); 34a ("The evidence does not indicate that the abandonment of the ten percent rule or other decisions regarding school siting were the result of a desire to perpetuate the dual system or circumvent the district court's orders,"); 40a (district court "concluded that any disparity as to the condition of the facilities [in black and white neighborhoods] that might exist was not caused by any intentional discrimination by CMS," a finding that "is clearly determinative of the question of unitary status as to facilities."); 35a (considering burdens of busing and approving "district court's conclusion that the realities of the current situation should not block a unitary status determination" even though the "current realities" to which district court referred were the location of new schools in white areas and the creation of numerous inner-city satellites from which black pupils were transported, 273a-274a, school district practices to which the courts below applied an intentional discrimination standard).

The emphasis of the majority of the court of appeals on the necessity to show post-1970's intentional discrimination to establish that current disparities are vestiges of the prior dual system is contrary to the controlling decisions of this Court. It had two related effects, moreover that require review and reversal of the judgment below: first, it removed the presumption applicable in *de jure* school segregation cases that ongoing racial disparities in the operation of the schools are causally related to the dual system; second, it shifted the burden of proof from those seeking to end the district court's jurisdiction - the party moving for unitary status - to the original plaintiffs. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 207-211 (1973).

III

The Court Below Departed From Established Precedent In Declaring The Charlotte School District Had Attained Unitary Status Without Requiring The School District To Comply With Outstanding Desegregation Orders.

Under *Dowell* and *Freeman*, a school district must demonstrate compliance with the outstanding orders of the court before it can be released from court supervision. *See, e.g., Freeman*, 503 U.S. at 492. Yet the courts below declared that CMS had attained unitary status even though the history of the case and the trial record showed that the system had never complied with express orders designed to further desegregation. Certiorari should be granted to review and reverse this stark departure from this Court's standards for determining unitary status.

From 1969 until 1973 the Board repeatedly challenged the district court's authority to order desegregation, and the court entered numerous specific orders to accomplish that result. In 1974, the Board adopted guidelines for desegregation that the court embraced as a break from the Board's previous attitude, with the caveat that the principles must be implemented to end the litigation. The court was emphatic:

> The future depends upon the implementation of the new guidelines and policies. This approval is expressly contingent upon the implementation and carrying out of all the stated policies and guidelines. Here is the heart of the matter. Only if they are thus implemented is it likely that a fair and stable school operation will occur, and that the court can close the case.

Swann, 379 F. Supp. at 1103. In 1979, the same judge ruled in *Martin* that the *Swann* orders, including the guidelines from 1974, had not been implemented in specific areas. The facts from the trial record showed, and the school board admitted, that CMS had not, since *Martin*, complied with the prior orders regarding the location of new schools, the monitoring of student transfers to prevent resegregation, and the balancing of the burdens of desegregation. Despite the undisputed facts of non-compliance in these areas, the courts below declared that CMS had attained unitary status.

The courts below reconciled this record of non-compliance by dismissing the significance of *Martin*. The courts found the "concerns" of that case had no relevance to the unitary status inquiry because *Martin* had not itself been a unitary status hearing. The court of appeals declared that consideration of CMS's continued non-compliance with the *Swann* orders as outlined in *Martin* "would defy common sense and run afoul of developments in the Supreme Court's school desegregation jurisprudence." *Belk*, at 32a.[5] That holding, however, is flatly inconsistent with *Freeman's* requirement that a school board must demonstrate its "commitment to the *entirety* of a desegregation plan" in order to attain unitary status, 503 U.S. at 498. The school board must show that compliance with all orders entered in the desegregation case, not just selective acquiescence with some. *See Dowell*, 498 U.S. at 249-50. ("The District Court should address itself to whether the Board has complied in good faith with the desegregation decree since it was entered, *and* whether the vestiges of past discrimination had been eliminated to the extent possible) (emphasis supplied); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437-

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[5] The dissent in the court of appeals found the findings in *Martin* "are as binding on the parties as any others made in the course of this litigation." *Belk.* at 155a, n. 10 (*Motz and King dissenting*).

40 (1976) (until modified or vacated by court with authority to do so, injunctive decrees must be obeyed even if they contain provisions contrary to rulings issued by this Court subsequent to their entry), *citing Walker v. City of Birmingham*, 388 U.S. 307 (1967) and *United States v. United Mine Workers*, 330 U.S. 258 (1947). That reasoning of the court of appeals misapprehends the holdings in *Freeman* and *Dowell* and requires review and reversal by this Court.

IV

The Court Below Erroneously Sanctioned The Trial Court's Refusal To Consider The School District's Proposal For Eliminating The Vestiges Of Segregation To The Extent Practicable

The heart of the *Dowell/Freeman* test is that a formerly segregated school district must eliminate the vestiges of segregation to the extent practicable. Courts have long recognized the primacy and importance of allowing local school boards to determine in the first instance what measures might most effectively and practicably accomplish its constitutional obligations. The school district here made just such a determination by adopting and submitting to the court a remedial plan with specific proposals for complying with the orders of the court and eliminating the vestiges of discrimination within a specified period of time.

The district court not only refused to consider the Board's plan; it refused to even allow it into evidence, thus completely ignoring the most probative and relevant evidence on the question of eliminating the vestiges and ignoring the strong and long tradition of federal courts' deferring to local school board efforts to desegregate local schools. This Court recognized that tradition in its decision in this case:

> Remedial judicial authority does not put judges automatically in the shoes of school authorites whose powers are plenary. Judicial authority enters only when local authority defaults. School authorities are traditionally charged with broad power to formulate and implement educational policy.

Swann, 402 U.S. at 16. It was only after the school authorities repeatedly defaulted in their obligation to develop a plan in the original case that Judge McMillan adopted a plan developed by a court appointed consultant.

The ultimate rationale for the district court's refusal to admit and consider the Board's remedial plan was the court's objection to "the plan's cardinal fixation on racial preferences", 279a-283a. Of course, however, a desegregation plan must take race into account. *See North Carolina State Bd. of Ed. v. Swann*, 402 U. S. 43 (1971); *McDaniel v. Barresi*, 402 U. S. 39 (1971). The court rejected the plan because it did what a desegregation plan is supposed to do -- take race into account.

The majority below affirmed the district court's refusal to consider the plan, although it did not adopt the district court's rationale. Nonetheless, the rationale adopted by the majority is likewise flawed. The majority's statement that *Freeman* and *Dowell* do not mandate consideration of the remedial plan in determining the issue of vestiges (53a-55a) signals a fundamental misreading of those cases. *Freeman* and *Dowell*, as well as *Green*, do mandate consideration of the Board's plan because the plan demonstrates that there is more that the Board can practicably do to eliminate the vestiges. There is simply nothing in any of those cases that supports or suggests that a plan developed by the school board and offered as a demonstration that continuing racial disparities linked to the

original dual system can be eliminated or reduced can or should be ignored by the court.

The majority's alternative rationale, that the refusal constitutes harmless error, is equally flawed, if not more so. The majority looked at the plan, although the plan was not made a part of the record nor analyzed by the district court, and pronounced it both duplicative of other evidence (54a) and "short on specifics" (55a). This approach flagrantly confuses the appropriate roles of trial and appellate courts and warrants the exercise of this Court's supervisory authority over lower federal courts.

On its face, the plan is powerfully probative on the important student assignment issues in the case. The district court and the court below excused continued racially identifiable schools on the grounds that demographics and logistics required construction of most new schools in white suburbs and limited the extent to which (at least white) pupils could be transported for desegregation purposes. The CMS "controlled choice" plan at least offered a realistic promise of substantially reducing the level of racial isolation and identifiability at many schools without engaging in logistically impossible transportation or creating greater reassignment burdens. Surely it should have been evaluated on the record by the trial court rather than ignored. To find unitary status without even assessing its promise through the adversary process and formal findings that can be properly reviewed by an appellate court makes a mockery of the careful instructions about unitary status determinations this Court gave in *Dowell* and *Freeman*.

CONCLUSION

In *Dowell* and *Freeman* this Court established the parameters for ending court supervision of formerly *de jure* school systems. The case below, widely followed in its trial

and appellate phases, particularly by the hundreds of school systems that remain under court supervision, greatly distorts and even inverts the standards established by this Court. The decisions below, left unreviewed, promise the nation an end to school desegregation decrees even where a school district has taken actions that resegregate its schools, where it has not complied with outstanding orders of the court and where tangible vestiges of segregation exist. The practical steps a district knows it could take to comply with the prior orders and eliminate the persisting unresolved racial disparities in the operation of its schools will be irrelevant. A board's failure to meet its affirmative constitutional duties under a desegregation order will be excused simply if that failure was not intentional. The burden will now be on the black plaintiffs to show not that tangible vestiges of the *de jure* era still persist, but to prove that those continuing disparities are the result of new, intentional discrimination. Such a result is a complete and dramatic departure from this Court's school desegregation precedent and compels this Court's review.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
DENNIS D. PARKER
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th fl.
New York, NY 10013
(212-965-2200)

*JAMES E. FERGUSON, II
JULIUS L. CHAMBERS
JOHN W. GRESHAM
S. LUKE LARGESS
FERGUSON STEIN CHAMBERS
WALLAS ADKINS GRESHAM
& SUMTER, P.A.
741 Kenilworth Ave., Ste. 300
Charlotte, NC 28204
(704) 375-8461
**Counsel of Record*
Attorneys for Petitioners